United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-1313

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARTIN F. SCHOLOFF,

Petitioner,

v.

WILLIAM SAXBE, ATTORNEY GENERAL
OF THE UNITED STATES
JOHN R. BARTELS, JR., ADMINISTRATOR
DRUG ENFORCEMENT ADMINISTRATION
OF THE DEPARTMENT OF JUSTICE,

Respondents.

No. 74-1313

PETITION TO REVIEW AN ORDER OF
THE DRUG ENFORCEMENT ADMINISTRATION

BRIEF OF RESPONDENTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Counterstatement of the Issues Presented for Review

1. Whether a conviction for a drug related felony is rendered nugatory for purposes of Section 304(a) of the Controlled Substances Act if that conviction was based upon a plea of nolo contendere.

2. Whether a registrant is denied due process by not having had facts relating to the offense for which he was indited and convicted considered by the hearing officer and Administrator for whatever effect they might have upon sanction mitigation where the registrant made no effort to introduce such evidence into the record at the hearing.

3. Whether the Administrator is bound by the conclusions of a hearing officer or is entitled to consider de novo matters relating to sanction imposition.

Counterstatement of the Case

Petitioner Martin F. Sokoloff, M.D. ("registrant") was convicted after having entered a plea of nolo contendere to an indictment charging felony violations of Sections 841(a)(1), 842(a) and 829(a) of the Controlled Substances Act; specifically, distributing and dispensing amphetamine sulfate tablets, Schedule II substances. After a hearing on an order to show cause as to why the registrant's Certificate of Registration should not be revoked, the Administrator, Drug Enforcement Administration, issued an order dated February 4, 1974 (Petitioner's Appendix 65a) revoking the petitioner's registration under authority of Section 304(a) (21 U.S.C. 824) of the Act without prejudice to Dr. Sokoloff's right to reapply for registration limited to Schedules III, IV and V.

At the revocation hearing registrant offered no evidence relating to the basis of charges giving rise to the indictment.

POINT I

It is the conviction for a drug related crime which is the sole requirement for revoking or suspending a controlled substance registration

We agree with most of what the registrant says to the effect that a plea of nolo contendere cannot be used to prove maters of fact giving

rise to the offense charged in the indictment in any other action or proceeding. (Petitioner's Brief Point I)

We do not agree, however, that a nolo plea serves to eradicate the fact of conviction and find no authority even remotely suggestive that it does.

The statutory basis for revoking the Certificate of Registration of the petitioner is Section 304(a)(2) (21 U.S.C. 824(a)(2) which provides:

> DENIAL, REVOCATION, OR SUSPENSION OF REGISTRATION
>
> SEC. 304(a) A registration pursuant to section 303 to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon finding that the registrant - -
> * * * * * * * * * * * * * *
> (2) has been convicted of a felony under this title or title III or any other law of the United States, or of any State, relating to any substance defined in this title as a controlled substance.

It is true that the case of Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957) which the registrant cites as inapposite, differs factually in the minor respect that the appellant there failed to disclose the fact of conviction and this ommission triggered deportation proceedings but this factual distinction has no material significance and it is most difficult to accept the proposition that " . . . the case is supportive of petitioners position." (Petitioner's Brief p. 11). In Tseung Chu, as in the case presented for review, the question was whether the fact that a conviction occurred can be proven in a separate proceeding where the conviction was founded upon a nolo plea.

The Tseung case is significant in establishing that there is nothing characteristically inherent in the plea of nolo contendere - from the standpoint of its common law derivation - which requires eradication of the fact that a conviction occurred for purposes of any separate proceeding. Thus in examining Hudson v. United States 272 U.S. 451 (1926), cited at p. 9-10 and 14 of Petitioner's Brief, the Court pointed out (at p. 937):

> The Hudson case, in which Chief Justice Stone takes the opportunity to prove his extraordinary knowledge of the English Common Law, does not stand alone for the rule, as appellant maintains, that a plea of nolo contendere "does not create an estoppel to deny conviction." Mr. Justice Stone points out that in Hawkins, Pleas to the Crown, 8th Ed. Book 2, Chap. 31, 466, the author treats rather inadequately of Confessions; Express or Implied; and that under early English practice an "implied confession, as contrasted to the express confession, does not estop the defendent to plead and prove his innocence in a civil action." [272 U.S. 451, 47 S.Ct. 129]

The Court then went on to quote Chief Justice Stone's commentary (247 F.2d at p. 937):

> Thus far the Chief Justice has been describing the contents of the early English text. He then states:
>
> > "But even if we regard the implied confession as a petition (for the mercy of the King) which in Hawkins' time had to be accepted as tendered, in modern practice it has been transformed into a formal plea of nolo contendere. Like the implied confession; this plea does not create an estoppel, but like the pleas of guilty, it is an admission of guilt for the purposes of the case." (Emphasis and portion in parenthesis added.) Cf. also, United States v. Norris, 1930, 281 U.S. 619, 622, 50 S.Ct. 424, 74 L.Ed. 1076.

And finally to observe as to Tseung Chu (also at p. 973):

> Appellant was not asked on his application for visa if he was or was not guilty of any crime; nor if he had or had not plead guilty to a crime. He was asked if he had ever been convicted. It was to this that his answer was "none." It was this that was false.

The crux of the apparent confusion as to the effect of a plea of nolo contendere is the distinction between proof in another proceeding of the commission of a crime versus proof of conviction of a crime. Bruno v. Reimer 98 F.2d 92 (2nd Cir. 1938) was relied upon in Tseung, supra (at p. 937) to point out this distinction:

> The Second Cicruit court in the Bruno case, in rejecting the alien's plea that a nolo contendere plea is not a conviction, had this to say by per curiam opinion (pages 92-93):
>
> "* * * It is true that the plea is not treated as a confession, which can be used against the accused elsewhere; but it gives the judge as complete power to sentence as a plea of guilty. Hudson v. United States, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347. And it is as conclusive of guilt for all purposes of prosecution under the indictment, (citations). Moreover, a sentence upon it is a conviction within the terms of a local statute applying to second offenders. (citation) The relator might succeed, therefore, if deportation depended upon his admission of the commission of a crime, as it may in the case of crimes committed before entry; but since it depends upon conviction and sentence, conviction and sentence are the only relevant facts, and the accused may be deported whenever these have been procured by any lawful procedure, as in the case they were." (Emphasis added.)

In other cases dealing with state license revocation or suspension proceedings judgment of conviction as distinguished from the plea upon which the conviction was based has been considered as dispositive.

In In Re Eaton, 152 N.E. 2d 850, 14 Ill, 2d 338 (1958), a lawyer, who had upon a plea of nolo contendere been convicted of using the mails to defraud and obtain money under false pretenses, sought to argue in disbarment proceedings that a judgment of conviction, on a plea of nolo contendere, does not amount to a conviction, and cannot be treated as an admission in any other proceeding. In considering the difference in effect, if any, between a conviction after a plea of not guilty, and a conviction on a plea of nolo contendere, the court said:

> In our opinion, there is no logical distinction in a disciplinary proceeding between a conviction under a plea of nolo contendere, on the one hand, and a conviction under a plea of guilty or an adjudication of guilt after a plea of not guilty on the other. The issue is whether the Respondent has been convicted of a crime of moral turpitude. (At p. 852, emphasis added).

In Re Bosch 175 N.W. 2d 11 (1970) was another disbarment proceeding where the court held that a nolo contendere plea had no effect upon the actual fact of conviction on which statutory authority for the disbarment proceeding was founded. There the court held:

> The fact that the defendant has entered a plea of nolo contendere to the charges does not render the judgment of conviction any less of a conviction than if he had been found guilty by a jury (at p. 15).

An identical holding is found in Christensen v. Orr. 275 CA. App. 2d 12, 79 Ca. Rptr. 656 (1969) where:

> license suspension was based on the ultimate fact of Christensen's conviction, not upon any implied admission or the manner in which that conviction was obtained (at pp. 65 - 67).

Thus rule that a plea of nolo contendere has no mitigating effect on the fact of conviction for purposes of a statute authorizing license revocation, in the event of such conviction, is rooted in a stirct distinction which the courts have made and maintained between the judgment of conviction, rendered upon the plea of nolo contendere, and the plea itself. While recognizing that there are obvious differences between the pleas of nolo contendere and guilty in nature and purpose, the courts have held, as set out in Lee v. Wisconsin State Board of Dental Examiners, 29 Wisc. 2d 330, 139 N.W. 2d 61 (1966) which involved revocation of a license to practice dental medicine that

> under the majority rule this distinction in the pleas [of nolo contendere and guilty] does not carry over to the conviction. A judgment of conviction based on a plea of nolo contendere is a conviction based on a plea of guilty or verdict of guilty. There is no difference in the nature, character or fact of a judgment of conviction depending on the nature of the underlying plea (at p. 63).

POINT II

> Both the proceedings giving rise to the order of the Administrator and the order itself comport with established standards of administrative due process

The registrant's due process attack challenges: (a) the adequacy of the Order to Show cause; (b) the conduct of the hearing; (c) the findings upon which the final order was based; (d) the weight to be accorded the conclusions of the Administrative Law Judge, and (e) the propriety of the sanction imposed by the Administrator (See Petitioner's Brief pp. 17-22).

It submitted that a point by point examination of this attack clearly demonstrates that the registrant has not been denied due process of law.

(a) The order to show case was not defective since it complied with statutory requirements

Doctor Sokoloff first argues that the order to show cause (Petitioner's Appendix 21 (a) should have mentioned "suspension" as a possible sanction - not outright revocation - and that if it had the Administrative Law Judge would then have seen able to ". . . make findings why petitioner's registration should only be suspended or that, if suspended, whether it should be in whole or only in part, for what period of time and that it should not be denied forever."1/ (petitioner's Brief p. 18)

Inherent in the argument is the falacious assumption that it is the function of the Administrative Law Judge to make conclusive findings; it is not - he is only to recommend them. See point II (d) infra.

Moreover, a fair reading of the "Decision and Recommendation" of the Administrative Law Judge (Petitioner's Appendix pp. 54a-62a) suggests that it was not only clear to the Judge that he understood his function to be only recommendatory but that he was in fact recommending suspension - and/or that consideration be given to

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1/ Petitioner can always apply for a new registration. See pages 21 and 22 of Point II infra.

limiting whatever sanction which was to be imposed by the Administrator to particular controlled substances (at Petitioner's Appendix pp. 60a, 62a):

* * * * * * * * * * * * * * * * *

Recommendation

> I take the doctor's lawyer at his word when he said that total revocation of his client's registration means effective curtailment of his capacity to practice the medical profession. Section 304, above, provides that the Attorney General "may" revoke a registration in the event of a conviction; clearly it does not mandate that total action.
>
> * * * * * * * * * * * * * *
>
> And finally, Section 304 itself literally reveals a congressional intent that the administrative hand of government not exact the full measure of judicial retribution in each and every case. Section 304(b) reads as follows:
>
> > "The Attorney General may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist."
>
> I respectfully recommend that the Attorney General not revoke the registration certificate in this case. [emphasis added]

Additionally, the requirement of notice goes to the question of appraising those involved in contemplated proceedings of the charges involved and the basis of the charges so that preparation may be made to defend against them. It is plainly not the office of the notice pleading - in this case the order to show cause - to spell out every conceivable sanction which might be imposed. cf. 5 U.S.C. § 558 (which refers only to ". . . notice by the agency in writing of the facts or

conduct which may warrant the action. . ."). In any event it would seem obvious from the most cursory glance at 21 U.S.C. § 824(a) that the power to revoke includes the possibility of suspension, i.e. an alternative.

(b) Dr. Sokoloff was afforded the opportunity of a full hearing

The registrant also complains about the conduct of the hearing contending that he was ". . . precluded from contesting guilt of the charge and the gravamen of the charges contained in the indictment to which he had entered the noncivilly binding plea of nolo contendere." (Petitioner's Brief p. 19)

The only reason why the Doctor was "precluded" from contesting guilt was that it was understood and agreed at the hearing by counsel for both parties and the Administrative Law Judge that a resolution of the question of law as to whether a conviction based on a nolo pleas constitutes a conviction for purposes of 21 U.S.C. 824 (a)(2), would make any such proof unnecessary. Plainly it was Dr. Sokoloff's position (and is here; see Point I Petitioner's Brief) that the government could not merely "rely" upon a nolo plea but had to prove anew the charges contained in the indictment. See A.J.L. Exhibit 4, indexed as "Request for Hearing signed by Dr. Sokoloff" and Transcript of Hearing pp. 13-26, particularly p. 18, p.23 (Petitioner's Appendix 39-52; 44a, 49a). Presumably the petitioner was satisfied that had he ultimately prevailed on the issue of law, the government would be unable to proceed.

There is no suggestion in the record however that the Doctor was interested in "contesting guilt" for purposes of mitigation; i. e. as a basis for urging that suspension rather then total revocation be recommended or finally decided upon. Plainly the effort of the petitioner was to obtain a ruling dispensing with any sanction as a matter of law. Had an effort been made to bring in evidence relating to the conviction which may have been exculpatory or a matter of defense for purposes of its effect upon sanction recommendation or determination there is no reason to supose the Administrative Law Judge would not have made such proof part of the record. Nor is there any indication the government would have objected.

(c) The final order of the administrator contained adequate findings of fact

Petitioner also argues that ". . . there has been no . . . findings of fact by the . . . [Administrator]. . . as set forth in § 877, Title 21 U.S.C.1/ No reference is made in the Administrator's order to specific findings of fact although comment is made on findings of fact, conclusions of law and recommondations of the United States District Court and the Administrative Law Judge, and an 'opinion' is rendered." (Petitioner's Brief p. 21)

Here again the registrant would presumably have the Administrator make specific findings relating to the conduct which the government claimed constituted the basis for the indictment in the criminal pro-

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1/ Actually findings of fact are called for in 5 U.S.C. § 557(c) and 21 C.F.R. § 316.66

ceeding. As pointed out in argument (b) above, however, the issue of law concerning the effect of a conviction based upon a nolo plea make any such finding unnecessary; the only fact findings dispositive being those referred to as findings of fact #1-4 in the Administrator's final order (Petitioner's Appendix 65a).

(d) The function of the Administrative Law Judge was properly discharged in recommending rather than "finally" deciding the sanction to be imposed since the Administrator may properly determine de novo the appropriate sanction.

The Doctor makes two assertions to support his contention that the Administrator should have been bound by the "decision" of the Administrative Law Judge; first, that 5 U.S.C. § 557(b) relating to the conclusiveness of certain "initial" decisions was not complied with and, second, that the Administrative Law Judge only ". . . assumed he could only recommend. . ." and consequently was "deprived" of ". . . his right to conclusively determine whether or not all or only part of the registration should be suspended. . ." (Petitioner's Brief p. 21). He also says that in consequence ". . . the Administrator should be directed to abide by his administrative judge's decision. . ." (Petitioner's Brief p. 22).

But as will be demonstrated:

(a) 5 U.S.C. § 557(b) was in fact complied with and

(b) the Administrator may consider de novo the question of sanction propriety and is not bound by what the hearing officer suggests.

5 U.S.C. § 557(b) provides in part:

> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearing pursuant to section 556 of this title shall first recomment a decision.

The registrant urges that since the agency did not preside at the reception of evidence and since there was no ". . . appeal to or review on motion of the agency. . ." then ". . . that [Administrative Law Judge's] decision . . . becomes the decision of the agency.

However this result will not apply according to the plain terms of § 557(b) where ". . . the agency requires either in specific cases or by general rule, the entire record to be certified to it for decision. This precisely is what is required. Thus § 316.65 of the regulations provides inpart:

> (b) The presiding officer shall certify to the Director [Administrator] the record, which shall contain the transcript of testimony, exhibits, the findings of fact and conclusions of law proposed by the parties and his reports. 21 C.F.R. § 316.65

Hence in reality the Administrative Law Judge is not making even an "initial" decision (which might become final if the other conditions in § 557(b) appeal etc. did not occur); all that is involved is a recommendation which may or may not be adopted by the administrative agency depending upon whether it finds the recommendation to be consonant with its assessment of regulatory enforcement policy. See Davis, Administrative Law Treatise, Vol 2 § 10.03 (1958) and 1970 supplement § 10.03.

Of course it is true that when it comes to the question of credibility and demeanor the Administrative Law Judge is in the best position to observe and his findings and conclusions in this regard must be given great weight. See Davis, Vol. 2 § 10.04 (1958) supra, and, 1970 supplement § 10.04. See also Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) at p. 491-497 (which also establishes the principle that an administrative agency may reject the findings of a hearing examiner even though not "clearly erroneous.")

But it is also sometimes true that when it comes to the question of "penalty" or sanction, the hearing officer may be (understandably) more sympathetic to the plight of the violator than overall law enforecment and the agency's effort to accomplish congressional purpose.

Fink v. Securities and Exchange Commission 417 F.2d 1058 (2nd Cir. 1969) aptly explains the nearly exclusive province which the administrative agency has in deciding upon sanction terms. There the Hearing Examiner ordered a securities salesman suspended for two months because of certain misrepresentations on sales. For these misrepresentations the S.E.C. ordered him barred for life. The Court said (at p. 1059):

> Fink now seeks review of the Commission's order and reinstatement of the Hearing Examiner's suspension order, arguing that the increase in penalty ordered by the Commission was harsh, unreasonable and not in the public interest.
> * * * * * * * * * * * * * *
> Fink's first contention is that the Commission should not have gone beyond the Hearing Examiner in determining the sanction required by the public interest. Section 8(a) of the Administrative procedure Act, 5 U.S.C. § 557(b), clearly authorizes the agency to "make any findings or conclusions which in its judgment are proper on the record," notwithstanding a different determination by the Examiner. See N. Sims Organ & Co. v. Securities and Exchange Commission 293 F.2d 78, 80 (2nd Cir. 1961). Moreover the precise contention advanced by Fink with regard to an increase in sanction was decided recently in favor of the Commission in Hanley et al. v. Securities and Exchange Commission, 415 F.2d 589 (2nd Cir. July 24, 1969).

Although not involving disagreement between hearing officer and administrative agency on the question of duration of sanction to be imposed, as at bar, the case of Greater Boston Television Corporation v. F.C.C., 444 F.2d 841 (D.C. Cir. 1970) is of interest in its examination of the relationship between officer and agency in the

broader sense where disagreement also concerns findings of fact and related decisions and conclusions. The Court (Leventhal, J.) noted (at p. 853):

> It does not decry the significance and value of the Examiner's efforts that the Commission disagreed with his decision and with several of his conslusions; indeed, it attests to his care that his decision was useful although the conclusion was reversed.

Since the question of the existence of supporting substantial evidence was present the Court was more exacting in its examination of the administrative agency's deliberations (at p. 853):

> The Examiner's decision is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial evidence. The agency's departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision. Yet in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs.

Also in dispute was the question as to whether misconduct had taken place. The Court commented and concluded (at pp. 856, 857):

> Although in the present case, unlike others, this Examiner perceived no misconduct, that issue, and the assessment of the seriousness of the misconduct, involves the judgment and discretion of the Commission.
> * * * * * * * * * * * * * *
> There is no chart that can forecast the flow and pace of sound administrative discretion, and hence there is always some possibility of surprise. The same might be said of stiffenings and relaxations of sentencing policy that pulse through the courts, often long after the crimes. Discretion is particularly broad when an agency is concerned with fashioning remedies and setting enforcement policy. Consolo v. F.M.C., 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed. 2d 131 (1966); WOKO, Inc. v. F.C.C., 71 U.S. App. D.C. 228, 109 F.2d 665 (1939).

And finally, in addressing itself to the need for remedy flexibility (at p. 859):

> We think the course adopted by the Commission cannot be considered as arbitrary or unreasonable, or as in violation of legislative mandate. The remedies fashioned through the exercise of its discretion are not without an element of novelty.
>
> "In the evolution of the law of remedies some things are bound to happen for the 'first time.'" International Bhd. of Operative Potters v. N.L.R.B. 116 U.S. App.D.C. 35, 39, 320 F.2d 757, 761 (1963).
>
> (e) The question as to which sanction should be imposed is more appropriate for the administrative agency to determine than the courts in the absence of the clearest circumstances of discretionary abuse.

Petitioner also agrees, in effect, that unless the Administrator considers suspension in some limited form1/ to be the most appropriate

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1/ The Administrator did go into the question of whether a limited suspension (see 21 U.S.C. § 824(b)) would be appropriate in this case-presumably in response to the suggestion to this effect in the recommendation of the Administrative Law Judge (Petitioner's Appendix 62a). See final order (top of second column (Petitioner's Appendix 66a). Furthermore, a companion case appearing in the Federal Register the same day as order here entered The Administrator referred to the policy reasons for limited suspensions in "physician" cases:

> There appears today in the FEDERAL REGISTER the Administrator's decision in the matter of Dr. Martin F. Sokoloff. The facts in that proceeding are discussed at some length and are so similar to the facts in the matter of Dr. Patrick A. Lorey that extended comment here would be repetitive.
> * * * * * * * * * * * * * * * *
> In light of these facts Administrative Law Judge Miles J. Brown recommends that the Drug Enforcement Administration grant a Certificate of Registration to Dr. Lorey "covering controlled substances in Schedules II, III, IV, and V".

Continuation of footnote:

However, Judge Brown further recommends that the Certificate "be suspended insofar as 'amphetamines' are concerned". At the hearing, counsel for DEA explained the extreme diversion potential which would be caused by permitting a physician to be registered in a particular schedule while "suspending" him as to a particular drug included in that schedule. Counsel noted that in the case of a manufacturer a registration is issued identifying the particular drug he is authorized to manufacture. This procedure, he pointed out, cannot be followed with regard to physicians "because of the number of drugs they prescribe". Consequently, manufacturers are registered as to specific drugs, physicians as to general categories. Thus, a supplier would know only that a physician was permitted activity in certain schedules and not be aware of interior limitations. (Transcript of Hearing. pages 158-159). See matter of Patrick A. Lorey, Federal register Vol. 39, No. 28 (Feb. 8, 1974) p. 4933-34.

sanction, then, his ". . . flat revocation as to Schedule II (both narcotic and non-narcotic) was arbitrary and capricious, constituted an abuse of discretion and an unconstitutional deprivation of property without due process of law." (Petitioner's Brief p. 21)

This contention presupposes a scope of review considerably broader than traditionally exists in the review of administration orders by the Courts. More specifically, the only question this court should be concerned with insofar as sanction imposititon is concerned is a limited inquiry into determining whether the Drug Enforcement Administration made an allowable choice of remedy.

The necessity of limited review stems from recognition that neither the hearing officer nor the Court is in as good a position as is the agency mandated by Congress to formulate and carry out regulartory enforcement policy. It is submitted that if under the circumstances here presented the Court was of the view for example that some form of suspension might be a more appropriate and reasonable sanction than total revocation, to order such a lesser sanction would be to improperly substitute judgment of the Court for that of the Administrator.

In point is Butz v. Glover Livestock Comm'n Co. 411 U.S. 182 (1973) involving the propriety of an order of the Court of Appeals for the Eighth Circuit which set aside as "unconscionable" a 20 day suspension of registration by the Secretary of Agriculture under the Packers and Stockyards Act because of the registrant's short-weighting of cattle practices. Held the Supreme Court (at p. 183):

> "We conclude that the setting aside of the suspension was an impermissible judicial instrusion into the administrative domain under the circumstances of this case, and reverse."

In recognizing and stressing that the judiciary exercises only a very limited power of review over orders fashioned by an administrative agency in implementation of its statutory responsibility, the Court referred to cases dealing with varied remedies and commented (at p.185):

> The applicable standard of judicial review in such cases required review of the Secretary's order according to the "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly matter for administrative competence.'" American Power Co. v. S.E.C., 329 U.S. 90, 112 (1946). Thus the Secretary's choice of sanction was not to be overturned unless the Court of Appeals might find it "unwarranted in law or . . . without justification in fact. . ." Id., at 112-113; Phetps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); Moog Industries, Inc. v. FTC, 355 U.S. 411, 413-414 (1958); FTC v. Universal-Rundle Corp., 387 U.S. 244, 250 (1967); Davis, Administrative Law Treatise, Vol. 4 § 30.10 pp. 250-251 (1958).

In the American Power Co. case, cited above, the Supreme Court had concluded (at p. 118):

> Our review is limited solely to testing the propriety of the remedy so chosen from the standpoint of the Constitution and the statute. We would be impinging upon the Commission's rightful discretion were we to consider the various alternatives in the hope of finding one that we consider more appropriate.***

The Court there affirmed a corporate dissolution ordered by the Securities and Exchange Commission, finding that the order was authorized by statute and was not "so lacking in reasonableness as to constitute an abuse of [the Commission's] discretion (329 U.S. at 115).

Similarly, in Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 414 and Federal Trade Commission v. Universal-Dundle Corp., 387 U.S. 244, 250, the Court noted that a reviewing court may not interfere with an administrative remedial order "in the absence of a patent abuse of discretion." And in Consolo v. Federal Maritime Commission, 383 U.S. 607, 618-621, and Barsky v. Board of Regents, 347 U.S. 442, 455, the standard of review applied was whether the agency action was arbitrary, capricious, or an abuse of discretion.1/

This principle is particularly appropriate in reviewing administrative orders imposing sanctions for violations of statutory and regulatory requirements. The determination of what sanction is necessary to deter future violations, by both the violator and others,

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1/ In dealing with corrective sanctions (i.e., sanctions designed to correct currently illegal condititons) the Supreme Court has sometimes found it additionally necessary to utilize a "rational basis" test to determine whether the administrative order was reasonably related to the elimination of the illegal condition. See Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608. But this is a broader scope of review than is needed in cases involving the imposition of remedial sanctions designed only to insure future voluntary compliance, for in such cases the statutory prescription of a range of remedial sanctions (such as suspension or revocation) itself satisfies any requirement of a rational relation between sanction and violation. Thus, in dealing with such remedial sanctions, the courts have applied a narrow scope of review asking only whether the administrative order was authorized by statue and was neither arbitrary, capricious, nor an abuse of discretion. Cf. In the Matter of Barsky v. Board of Regents, 305 N.Y. 89, 111 N.E. 2d 222, affirmed, 347 U.S. 442. In any event, it is submitted that the Administrator's order here would satisfy any such "rational basis".

must be based upon an informed judgment that can properly be made only by the expert body which is thoroughly familiar with conditions in the field to be regulated and the significance of the violations found. "[T]he due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution" (Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 141) requires that the courts respect the agency's judgment concerning the sanction that is appropriate in the particular case.

In sustaining sanctions imposed by the Secretary of Agruculture, in G.H. Miller & Co. v. United States 260 F.2d 286, (7th Cir. 1958) cert. den., 359 U.S. 907 the Court in an en banc decision (overruling a decision by a panel) sustained the revocation by the Secretary of Agriculture of the registration of a "future commission merchant" under the Commodity Exchange Act and states (260 F.2d at 296):

> It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made an allowable judgment in its choice of the remedy and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different panalty. [Emphasis in original.]

Finally, although total revocation as distinguished from suspension for a specific period might sound severe it should be kept in mind that revocation does not mean revocation "forever". Dr. Sokoloff is free to

make application for a new registration and that application will presumably be evaluated in good faith by the Administrator according to the then existing facts. See Fink v. Securities and Exchange Commission, supra (at p. 1060) where the Court pointed out:

> Under similar circumstances in Vanasco v. Securiteis and Exchange Commission, 395 F.2d 349 (2d Cir. 1968), we observed that a permanent bar from the industry seemed "sever," suggesting that "the Commission might, upon an application made to it, modify this sanction" if it were "satisfied after a period of suspension that [petitioner] could be trusted to comply with the law's requirments, . . . " Id. at 353. Accord, Hanly, supra, at 415 F.2d 598 and note 21; see Ross Securities, Inc, 41 S.E.C. 509 (1963).

In the particular case at hand this Court went on to comment and conclude:

> However, as in Vanasco and Hanley, both supra, we hold that the Commission did not abuse it broad discretion, see American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112-113, 67 S.Ct. 133, 91 L.Ed. 103 (1946); and Tager v. Securities and Exchange Commission, 344 F.2d 5, 8-9 (2d Cir. 1965) and we, therefore, will not disturb its conclusion in the mater of sanctions assessed in protecting the public interest. However, as suggested in Vanasco, Fink is not foreclosed from making such application to the S.E.C. in the future as may be warranted by the then existing facts.

CONCLUSION

The Administrator's order is neither arbitrary, capricious nor an abuse of the statutory discretion mandated by Congress and in consequence judical intervention would not be warranted.

Respectfully submitted,

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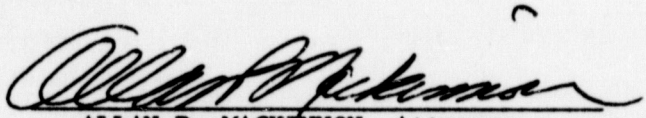
CERTIFICATE OF SERVICE

I hereby certify that on the 21th day of June, 1974, I personally served the "Brief of Respondent" to which this certificate is annexed by delivering a copy thereof to the offices of Raymond Bernhard Grunewald, Esquire, Attorney for Petitioner, Martin F. Sokoloff, at 16 Court Street, Brooklyn, New York 11241.



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